U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 November 2004

CASE NOS.: 2003-LHC-2173
2003-LHC-2174

OWCP NOS.: 07-141493
07-163007

IN THE MATTER OF:

COLUMBUS YOUNG

Claimant

V.

NORTHROP GRUMMAN SHIP SYSTEMS, INC.

Employer

APPEARANCES:

Sue Dulin, ESQ.

For The Claimant

Paul Howell, ESQ.

For The Employer/Carrier

Dana L. Ferguson

For The Regional Solicitor

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Columbus Young (Claimant) against Northrop Grumman Ship Systems, Inc. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Briefs were received from the Employer and Regional Solicitor. The parties entered into a joint stipulation, Employer offered 43 exhibits, and the Regional Solicitor proffered 5 exhibits. This decision is based upon a full consideration of the entire record.[1]

Based upon the stipulations of Counsel, the evidence introduced, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. The parties agree that an Order on the basis of this stipulation shall have the same force and effect as an Order made after a full hearing.

2. That the parties waive any further procedural steps before the administrative law judge other than the resolution of the Second Injury Fund issue.

3. That the parties waive any right to challenge or contest the validity of the Order entered into in accordance with the agreement.

4. That Claimant at all times pertinent hereto was subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act, since he was employed as an electrician in the construction of naval vessels at Employer's facility which adjoins the navigable waters of the Pascagoula River and the Gulf of Mexico.

5. That on or about September 24, 1996, while in the course and scope of his employment, Claimant injured his right shoulder, neck, and arm while pulling cables and moving transformers.

6. That Claimant's average weekly wage for this injury was $589.90.

[1] References to the transcript and exhibits are as follows: Employer Exhibits: EX-____; Regional Solicitor Exhibits: DX-___; and Joint Exhibit: JX-___.

7. That Claimant was temporarily and totally disabled as a result of this injury from October 5, 1996 to October 20, 1996; from October 26, 1996 to October 20, 1997; from January 9, 1998 to January 11, 1998; and from May 14, 1999 to September 20, 1999, at which time he reached maximum medical improvement (MMI). He was assigned a permanent impairment rating and permanent work restrictions for this injury.

8. That following the injury of September 24, 1996, Employer was able to accommodate Claimant's work restrictions and Claimant returned to work with no loss of wage earning capacity except for temporary total disability set out above.

9. That Claimant sustained a second injury on November 27, 2001, when a piece of grating fell against him and pinned him against a wall injuring his neck, back, and shoulder.

10. That Claimant's average weekly wage at the time of the injury of November 27, 2001, was $659.20.

11. That as a result of the injury of November 27, 2001, Claimant was temporarily and totally disabled from March 8, 2002 until August 29, 2002, at which time he reached MMI.

12. That as a result of Claimant's injuries, he has been rendered permanently and totally disabled from August 30, 2002 until the present and continuing based upon an average weekly wage of $659.20.

13. That Employer will remain responsible for Claimant's past and future causally related medical expenses pursuant to Section 7 of the Act.

14. That the parties agree that Counsel for Claimant shall be entitled to a reasonable and necessary attorney fee for successfully prosecuting this claim pursuant to Section 28 of the Act, in the amount of $25,000.00.

15. Employer will be responsible for the attorney's fee and/or lien of Claimant's previous attorney, if any.

16. That no penalties or interest are due.

17. That Employer will be entitled to a credit for any compensation heretofore paid for these injuries as against any liability for compensation owed in this matter.

18. That the sole issue left for resolution is the applicability of the Second Injury Fund.

According to its brief, the Regional Solicitor was "satisfied" with the Joint Stipulations, except to the extent that it did not concede to Second Injury Fund liability.

II. ISSUE

The sole remaining issue presented by the parties for resolution is Employer's entitlement to the Second Injury Fund (Section 8(f) relief).

III. STATEMENT OF THE CASE

Claimant's Testimony

Claimant, who was deposed on October 22, 2003, is a high school graduate and became certified in electrician work after completing a two-year vocational course at Pearl River Junior College. He also received an apprenticeship certificate after a two-year apprenticeship program in electrical work at Ingalls. (EX-38, p. 5). Prior to the work-related injuries presented in this matter, Claimant injured his lower back in a car accident in 1990.[2] He had no other back injuries or neck injuries. He also experienced a prior finger injury and pulled shoulder muscles. (EX-38, pp. 52-53).

Claimant was employed as an electrical technician. (EX-38, p. 9). His duties involved "compartment completion" during which he would "pull cables, [he would] cut down equipment, drill holes in equipment, [he] would mount equipment, hold objects for the welder to weld, [he] would test equipment, troubleshoot equipment." (EX-38, pp. 10-11, 58-60). Claimant used his hands, knelt, and stooped while performing his duties. The job required use of ladders, as well as going underneath and behind equipment. The lifting requirement was between 10 pounds and 80 pounds. (EX-38, pp. 10-11). The job involved overhead lifting about fifty percent of the time. (EX-38, p. 60).

On September 24, 1996, Claimant sustained his first injury while standing on a ladder as he tried to pull out a large cable. While "yanking" on the cable, Claimant felt a "pull" in

[2] The record contains references to a 1990 car accident as well as to a 1987 motor vehicle accident. It is unclear whether there is confusion as to the date of the incident or whether there were two separate accidents.

his right shoulder which he attributed to a pulled muscle and kept working. (EX-38, p. 13). After experiencing the "pulling" sensation, he waited for help in moving 80-pound transformers. Eventually, Claimant moved the transformers himself and believed his condition worsened. (EX- 38, p. 14). He went home and took Advil, but the pain persisted. He reported the injury the next day and reported to the shipyard infirmary approximately four or five days later. (EX-38, pp. 15-17). Claimant was examined by Dr. Warfield who prescribed Lortabs and Ibuprofen and released Claimant back to work. Claimant continued to experience pain through his shoulder, neck, and arm. He complained of the pain on and off for two to three weeks before he was told to see "an outside doctor." (EX-38, pp. 17-18).

Dr. Smith ordered Claimant to undergo an MRI and took him off work. The MRI revealed problems in the "C5-6 and C6-7." Dr. Smith also indicated Claimant had carpal tunnel. After approximately three months of treatment, Dr. Smith referred him to Dr. Danielson. (EX-38, p. 19).

Dr. Danielson ordered additional MRI studies and nerve conduction. On February 26, 1997, he performed surgery with Employer's authorization. (EX-38, pp. 20-21). Claimant did not experience problems with the surgical procedure. However, Claimant began vomiting blood, which required an additional procedure for which Employer refused to pay. (EX-38, pp. 22-23).

Dr. Danielson released Claimant to work effective October 21, 1997, subject to the following restrictions: lifting between 20 to 25 pounds, no overhead cable pulling, the opportunity to change positions as needed, and no ladder work when Claimant found it too painful. (EX-38, p. 25). He worked regularly within his restrictions until November 2001, despite periods of temporary disability.[3] (EX-38, pp. 26-29). Between 1997 and 2001, Claimant also saw Dr. Jackson. He was examined by Dr. Mostellar for a second opinion at the request of Employer. (EX-38, pp. 29-30). Following the September 1996 accident, Claimant experienced pain in his neck, shoulder, and arm. He also experienced back pain and pain into his legs and foot. He estimated the back pain began within one week of the injury, but he was more concerned with the pain in his right shoulder and neck. (EX-38, pp. 31-32).

[3] Claimant testified he did not work for a period of several months in 1999. An MRI and nerve conduction studies revealed carpal tunnel syndrome. However, Claimant chose not to undergo surgery because he was aware of poor surgical results in others. (EX-38, pp. 28-29).

On November 27, 2001, Claimant was involved in a second accident when 60 pounds of deck grating fell on top of him. (EX-38, pp. 35-37). He filed an accident report that day and saw Dr. Warfield the next morning. Claimant was prescribed medication and returned to work the following day. (EX-38, pp. 38-39). Claimant continued to work with limitations until he was examined by Dr. Jackson on January 28, 2002. Dr. Jackson ordered another MRI and nerve conduction. The MRI showed "more aggressive problems at C4, C3-C4" and Dr. Jackson referred Claimant back to Dr. Danielson. (EX-38, p. 40).

Employer sent Claimant to Dr. Dash for a second opinion. Dr. Dash allowed Claimant to return to work with the same restrictions Dr. Danielson placed on him after the first injury. Claimant did not return to work. Employer refused to approve treatment by Dr. Danielson. On his own, Claimant saw Dr. Danielson who recommended he pursue disability retirement and felt Claimant would not benefit from further surgical procedures on his hands or neck. (EX-38, pp. 41-43). Claimant did not return to work because "[t]hey didn't have nothing else for me, period. They wanted me gone." Claimant decided to pursue disability retirement. (EX-38, pp. 43-44).

Claimant participated in a labor market survey performed by Sanders and Associates and applied for jobs with "Coastal and Pinkerton." (EX-38, pp. 44-45). Dr. Jackson did not agree with the employment recommendations, re-emphasizing that Claimant should seek disability retirement. (EX-38, p. 44). Claimant spends the majority of his time watching television. He sweeps, washes dishes, and cooks on occasion. (EX-38, pp. 48-49).

Claimant has carpal tunnel syndrome in both hands, for which he wears braces on both hands. He also experiences pain in his neck that goes down his shoulder and into his arm and leg. He complained of a tingling, numb feeling and headaches. (EX-38, pp. 55-56). During the second accident, Claimant injured his left hand when he tried to block his face, and he claims he injured his neck, left arm, and left shoulder at that time. (EX-38, p. 57).

The Medical Evidence

Pre-Existing Medical Records

On May 12, 1990, Claimant was seen at Memorial Hospital in Gulfport, Mississippi. Claimant was injured in a motor vehicle

accident on April 30, 1990, and was diagnosed with a "cervical sprain" and a sprained left knee and leg. The diagnosis relating to Claimant's lumbar area is illegible. (EX-28, pp. 1-2). On September 2, 1993, Claimant presented with complaints of pain in his right "trap area."[4] Mild edema was noted in the area. (EX-11, p. 42).

Ingalls Infirmary

On October 4, 1996, Claimant sought treatment from Ingalls Infirmary and presented complaints of pain radiating from his right neck into his right shoulder, arm, forearm, and hand. The pain was aggravated by neck movement and rotation, as well as right lateral bending and overhead work. Claimant was taken off work and the physician opined he suffered from a possible "cervical disc." Claimant was seen again on October 7, 1996, October 8, 1996, and October 14, 1996, with no reported change in his condition. On October 21, 1996, the medical records indicated persistent pain with no objective findings. Claimant was released to light duty work with no lifting over 25 pounds, limited ladder climbing, and no prolonged or repetitive overhead work. (EX-29, pp. 1-2). On October 25, 1996, Claimant was taken off work after aggravating his injury with light overhead lifting. (EX-29, p. 4).

On October 21, 1997, November 13, 1997, and January 12, 1998, work release forms subjected Claimant to the following restrictions: lifting restricted to 20 to 25 pounds, no "prolonged ladder climbing" or overhead work, alternated sitting and standing, and no rapid head/neck extension. (EX-29, pp. 5-7). On April 17, 1998, Claimant complained of neck pain, although he denied a new injury. (EX-29, p. 8).

Claimant was examined at the infirmary on November 28, 2001, following the second accident. He complained of pain in the "left trapezius area that radiate[d] to the mid-upper chest area." An examination revealed painful head and neck rotation to the left or right. Claimant also demonstrated limited arm abduction. (EX-29, p. 10). Infirmary records did not indicate a change in Claimant's condition upon his return visits on December 3, 2001, December 20, 2001, and January 22, 2002. (EX-29, p. 10).

[4] The medical report is contained in Employer's Petition for Second Injury Fund Relief regarding the September 24, 1996 injury. However, the report does not contain the name of a doctor or a medical facility at which the examination was rendered.

Sydney A. Smith, M.D.

On October 28, 1996, Claimant was examined by Dr. Smith, whose credentials are absent from the record. Claimant presented with complaints of numbness, tingling, and weakness in his right arm that began in September 1996. Upon examination, Dr. Smith opined Claimant suffered from a possible "C6 radiculopathy" and "central disc herniation." He ordered an MRI scan of the cervical region and a somatosensory study of the arm. (EX-30, pp. 1-2). He reviewed Claimant's past medical history which revealed injuries from a motor vehicle accident, to which "[Claimant] says he completely recovered from that." (EX-30, p. 1).

On November 26, 1996, Dr. Smith reviewed Claimant's MRI and found "a broad based posterior protrusion and extrusion of the C5-6 disc associated with cord compression and a smaller left paramedian adjacent posterolateral disc protrusion at C6-7 associated with minimal cord flattening." The somatosensory returned normal results and Dr. Smith ordered a nerve conduction study and EMG. Dr. Smith also noted Claimant complained of lumbar pain and numbness in his right thigh. Dr. Smith referred him to Dr. Danielson and took him off work. (EX-30, pp. 8-9). Claimant returned for a follow-up on January 6, 1997, and Dr. Smith agreed with Dr. Danielson's suggested myelography. In addition, the EMG study did not indicate upper extremity problems, but showed "some drop out in the S1 intervention area." (EX-30, p. 10). Claimant was continued off work. (EX-30, p. 12).

A motor nerve conduction was performed on January 12, 1997, which showed "bilateral carpal tunnel syndrome by terminal latency indexing and entrapment of the Right ulnar nerve in Guyon's canal." (EX-30. pp. 13-14, 16). On July 16, 1998, Dr. Smith ordered additional nerve conductions, a somatosensory of his upper extremities, and a MRI scan of Claimant's neck due to increased numbness and difficulty in use of his right arm. In addition, Dr. Smith noted complaints of weakness and numbness in Claimant's right leg. (EX-30, p. 17).

In a letter dated July 29, 1998, Dr. Smith reported Claimant underwent cervical fusions by Dr. Danielson and was sent to him "because of persistent symptomatology." He further indicated that at his first visit in July 1996, Claimant's right arm numbness was secondary to his injury and maintained that "his persisting symptomatology is secondary to the injury and may never have actually been fixed." (EX-30, p. 18).

A nerve conduction study was performed on July 31, 1998, which revealed the following: (1) "bilateral cubital sulcus syndrome;" (2) "right carpal tunnel syndrome by terminal latency indexing;" and (3) a "slight decrease in amplitude of the right posterior tibial nerve" which Dr. Smith opined could "represent a beginning motor axonal neuropathy." (EX-30, p. 19). An MRI dated August 14, 1998, showed "C5-6 and C6-7 spondylosis with bilateral neural foraminal narrowing. Left posterolateral osteophytosis and presumed posterior disc extension are suggested at the C6-7 level . . . small central subligamentous C4-5 disc protrusion." (EX-30, p. 26).

Dr. Harry A. Danielson

On December 17, 1996, Claimant was first seen by Dr. Danielson, for a neurosurgical consultation, presenting complaints of pain in his neck and into his right shoulder, along with pain and numbness in his right arm and hand.[5] Claimant also complained of pain in his back and right leg, with tingling and numbness in his right leg, foot, and toes. Dr. Danielson found the arm and leg pain likely extended from cervical cord compression. He found Claimant's range of neck motion to be moderately to severely restricted. Dr. Danielson reviewed Claimant's cervical MRI scan of November 12, 1996, and found "disc herniations at C5/6 and C6/7 with cord compression at C5/6." Dr. Danielson recommended a cervical and lumbar myelogram and opined Claimant was temporarily and totally disabled. (EX-31, pp. 4-5).

On January 23, 1997, Dr. Danielson reviewed Claimant's cervical and lumbar myelograms of January 14, 1997, as well as the films of the "post-contrasted CT Scans." As to Claimant's neck, Dr. Danielson found "something obstructing the flow of the contrast" and indicated at "C6/7 it is almost completely blocked." He found "significant encroachment" at C5/6 and C6/7 with "pressure on the nerves" at these levels. The post-contrasted CT scan revealed disc herniation at C6/7 and C5/6. There were no notable findings as to Claimant's lower back. He suggested an "anterior cervical discectomy with donor bone fusion at C5/6 and C6/7." Claimant remained temporarily totally disabled. (EX-31, p. 10).

On February 26, 1997, Dr. Danielson performed the

[5] The record does not contain any information regarding Dr. Danielson's credentials.

recommended surgery. (EX-31, p. 16). On February 28, 1997, he performed a bronchoscopy of Claimant's left nostril. (EX-31, p. 17). On March 13, 1997 and April 22, 1997, Dr. Danielson indicated Claimant remained temporarily totally disabled. (EX-31, pp. 22, 25). As of October 21, 1997, Claimant was released to light duty work, subject to a lifting limit of 20 to 25 pounds occasionally and the opportunity to alternate sitting, standing, and walking as needed. In addition, Claimant was to avoid "rapid head/neck movement, working/stacking overhead, prolonged extension of the head/neck, and prolonged ladder climbing." (EX-31, p. 28). Dr. Danielson indicated these restrictions were permanent and on November 11, 1997, he offered clarification of the restrictions for Claimant and Employer. (EX-31, pp. 29-30). On January 8, 1998, Dr. Danielson placed Claimant at MMI and assigned a 15% anatomical impairment rating to Claimant's person as a whole. (EX-31, p. 31).

On September 24, 1998, Claimant complained of pain in his neck, right shoulder, right arm, and right hand. He also complained of numbness and tingling in his right arm and hand. In addition, Claimant was experiencing back pain with numbness and tingling in his right leg, foot, and toes. Dr. Danielson reviewed the cervical MRI scan of August 14, 1998, and found a "little protrusion at C3/4" and a "central disc at C4/5." The nerve conduction study from July 31, 1998, revealed "bilateral cubital sulcus syndrome and right carpal tunnel syndrome." (EX-31, p. 34). Claimant presented continued complaints of pain on November 5, 1998, but Dr. Danielson did not excuse him from work and continued him on the same duty. (EX-31, p. 35). On January 7, 1999 and April 1, 1999, Claimant returned with pain in his neck, shoulder, and arm. Dr. Danielson did not note any significant changes. (EX-31, pp. 36-37). On May 11, 1999, Dr. Danielson noted no improvement in Claimant's condition, ordered another cervical MRI scan, and took him off work until further notice. On June 9, 1999, Dr. Danielson opined the cervical disc herniations, carpal tunnel syndrome, and ulnar nerve lesions were causally related to the accident on September 24, 1996. (EX-31, pp. 38-39).

The MRI scan of June 21, 1999, showed a disc herniation at C3/4 and C4/5. On June 24, 1999, Dr. Danielson opined Claimant was temporarily totally disabled. On September 14, 1999, Claimant's condition had not changed and Dr. Danielson released him to work with restrictions identical to those of October 21, 1997. (EX-31, pp. 41-42).

On February 1, 2000, Claimant returned to Dr. Danielson

after experiencing worsened hand and right shoulder pain due to working with a cable. Dr. Danielson ordered an "EMG-Nerve Conduction Study of the right upper extremity" and a cervical MRI scan. On February 29, 2000, Dr. Danielson reviewed the MRI of February 16, 2000, which showed "post-surgical changes with previous interbody fusion at C5/6 and C6/7." There was no indication of a disc herniation. (EX-31, pp. 44-47). On July 18, 2000, Dr. Danielson reviewed an updated EMG-Nerve Conduction study which showed bilateral carpal tunnel syndrome. Claimant was instructed to continue working under the previous restrictions. (EX-31, p. 48). On December 14, 2000, Dr. Danielson assigned a 15% impairment rating to Claimant's person as a whole due to his work injury, herniated discs at C5-6 and C6-7, and the subsequent surgical procedures. In addition, he assigned a 3% impairment rating of Claimant's right upper extremity due to the carpal tunnel syndrome, a 3% impairment rating of the right upper extremity for the right ulnar nerve lesion, and an additional 3% impairment rating for his left upper extremity for the left ulnar nerve lesion. Claimant's permanent work restrictions were the same as those given on October 21, 1997. (EX-31, p. 49).

On June 27, 2002, Claimant returned to Dr. Danielson following the accident on November 27, 2001, complaining of pain in his left shoulder and arm, numbness and tingling in fingers on both hands, numbness in both hands, and occasional tingling in his right hand. He also complained of pain in his back and both legs, as well as numbness and tingling in both legs. Claimant's reflexes were intact and he had a moderately restricted range of motion in his neck. Dr. Danielson opined Claimant had "broad-based central protrusions at C3-4 and C4-5," "intact fusions at C5-6 and C6-7 with degenerative changes," "Carpal tunnel syndrome," and "denervation in the biceps and brachial radialis muscle of the left arm." Dr. Danielson opined Claimant would not likely benefit from further surgery and should pursue disability retirement. He agreed with Dr. Jackson's recommendation of cervical trigger injections and a left carpal tunnel procedure if the symptoms worsened. (EX-31, pp. 52-54).

On January 22, 2004, Dr. Danielson assigned a 3% anatomical impairment rating of the person as a whole for the chronic pain. In addition, he assigned a 3% permanent impairment of the upper left extremity for his carpal tunnel syndrome. (EX-31, p. 54A). On July 12, 2004, Dr. Danielson received a query letter which asked him whether he would agree that Claimant's pre-existing cervical injury and surgery "would combine with, and contribute

to, the effects of his injury of 11/27/01 to make the claimant materially and substantially more disabled than he would have been due to the injury of 11/27/01 alone." On August 8, 2004, Dr. Danielson signed and dated an affirmative response to the query without any explanation or further support. (EX-31, p. 54B). He did not provide an explanation for the affirmative response.

Dr. Henry C. Mostellar, Jr.

On October 14, 1997, Claimant was examined by Dr. Mostellar at Employer's request. The record does not reflect the credentials of Dr. Mostellar. Claimant presented with complaints of pain in the "right neck," numbness of the "right brachium" and the "anterior lateral right thigh," and tension in his right shoulder and neck when holding his hands over his head. (EX-32, pp. 1-2). Dr. Mostellar noted Claimant's only previous injuries were sustained in a car accident in 1987, and Claimant had no new injuries to his head, neck, or back since "October of 1996." Dr. Mostellar indicated Claimant returned to work with restrictions on October 21, 1997, and last worked on "November 1, 1996." Claimant reported blurred vision since the "on-the-job injury." (EX-32, p. 2). Physical examination revealed full neck motion, no localized weakness, and no sensory loss. Dr. Mostellar diagnosed Claimant with cervical degenerative disc disease and opined Claimant recovered from surgery with "well-healed and stable" fusions. (EX-32, p. 3).

Dr. Mostellar opined Claimant was capable of being employed and indicated he may be out of shape for full duty work. Dr. Mostellar recommended a four to six week rehabilitation program, followed by a Functional Capacity Evaluation (FCE) to determine Claimant's physical work restrictions. He felt Claimant was at MMI and assigned a 10% permanent partial impairment rating due to "bulging disc at two levels with and without surgery." (EX-32, pp. 3-4).

Dr. Joe A. Jackson

On May 16, 2000, Claimant was first seen by Dr. Jackson, a neurologist, upon referral of Dr. Danielson. The record does not reflect the credentials of Dr. Jackson. Dr. Jackson performed a nerve conduction study of both arms that showed "mild ulnar amplitude losses" and "bilateral mild carpal tunnel delays." Dr. Jackson also performed a needle exam of Claimant's right arm which indicated "old (resduing?) C6,7 changes and distal median unit loss." (EX-33, pp. 1-2).

On January 28, 2002, Claimant returned to Dr. Jackson after his second work-related injury. According to Dr. Jackson, Claimant suffered "flexion extension" injuries to his cervical spine and upper trapezius muscles. Claimant also received injuries to his left wrist when the grating fell on him. Dr. Jackson did not rule out the possibility of recurrent or new disc herniation "below or above the previous level." He ordered a nerve conduction/EMG of the left upper extremity and a repeat cervical MRI. Dr. Jackson also recommended Claimant undergo physical therapy and limited him to light duty with a maximum lifting allowance of 10 pounds. (EX-33, p. 5).

An EMG/nerve conduction was performed on March 7, 2002, and showed little change with continued carpal tunnel delays. Dr. Jackson found "denervation in the biceps and brachial radialis muscle of the left arm" and opined that there was "irritability in biceps and brachial radialis which would suggest a 5-6 lesion on the left side." (EX-33, p. 6). Claimant was not allowed to return to work until an MRI was performed and reviewed. (EX-33, p. 9).

On March 23, 2002, Claimant underwent an MRI which Dr. Jackson reviewed on April 3, 2002. The MRI revealed the following: "a broad-based disc protrusion that abuts the ventral cord and at C4-5 a broad-based protrusion of disc material that effaces the ventral thecal sac." Dr. Jackson recommended a re-consultation with Dr. Danielson and opined Claimant would not likely benefit from further surgery. Dr. Jackson recommended Claimant seek disability retirement based on his previous education and current work restrictions. (EX-33, p. 12).

On May 29, 2002, Claimant began physical therapy at Gulf Coast Physical Therapy Center of Orange Grove, pursuant to Dr. Jackson's request. Claimant was to receive physical therapy three times each week for two to three weeks. (EX-33, pp. 15-18). He returned to Dr. Jackson on July 9, 2002, after completing the physical therapy treatments. The therapy provided intermittent relief to Claimant's neck pain. Dr. Jackson maintained that Claimant could not return to work as an electrician and recommended he consider disability options. Dr. Jackson indicated "trigger point injections" into Claimant's "cervical musculature" could provide some pain relief and requested approval for one to three injections each week for three weeks. (EX-33, p. 19).

On August 29, 2002, Claimant received his final trigger

point treatment which did not provide significant change in his neck or back pain. Dr. Jackson noted that Dr. Danielson agreed Claimant should pursue disability retirement. (EX-33, pp. 24-25).

In a letter dated November 14, 2002, Dr. Jackson opined Claimant reached MMI on August 29, 2002. He further indicated Claimant should be placed on disability retirement. However, should Claimant choose to work, Dr. Jackson recommended a FCE and the following restrictions: no repetitive hand and wrist activities, no working at or over a 90-degree arm elevation, avoid fixed or adversed neck positions, and no lifting of more than 30 pounds. He deferred to Dr. Danielson's opinion as to a projected "PPD rating" for Claimant. (EX-33, p. 26).

In a letter dated July 22, 2003, Dr. Jackson indicated that he could not comply with a request to assign a permanent impairment rating to Claimant based on the AMA Guidelines, 5th edition. According to Dr. Jackson, the AMA Guidelines require use of an "inclinometer" to evaluate the permanent impairment of a patient with "multiple level cervical spine disease who have already had cervical surgeries." Nonetheless, Dr. Jackson opined Claimant cannot return to work and should seek disability retirement based on the "combination of his new discogenic injuries superimposed on his pre-existing disease and on his multiple entrapment delays as well at the wrist and at the elbows." (EX-33, p. 33).

On November 5, 2003, Claimant returned with continued complaints of neck pain, left elbow pain, and bilateral carpal tunnel symptoms. Dr. Jackson refilled Claimant's pain medication and prescribed wrist splints and a left elbow pad. He opined Claimant had "continued cervicalgia and bilateral carpal tunnel entrapments and left cubital tunnel entrapment." (EX-33, p. 37).

On March 24, 2004, Claimant underwent nerve conduction studies of his right arm which showed no significant changes. Claimant continued to have "mild carpal tunnel entrapments in addition to his other overall problems." Dr. Jackson recommended continued conservative treatment. (EX-33, p. 37A).

Dr. Paul D. Dash

On May 27, 2002, Claimant was seen by Dr. Dash at Employer's request to render a second opinion in the November 2001 accident. The record does not contain the credentials of

Dr. Dash. Dr. Dash reviewed the medical reports of Dr. Jackson and noted Claimant presented with complaints of pain in his neck, left shoulder, and arm. He also complained of numbness in his left hand. An examination of Claimant showed "moderately limited range of motion of the neck laterally with lateral rotation being only about 10 degrees to either side." Dr. Dash indicated Claimant had "reasonably good extension and flexion of the neck." (EX-34, pp. 1-2).

Dr. Dash diagnosed Claimant with "recurrent cervical strain with radicular symptoms" and found the EMG supported "the diagnosis of cervical radiculopathy." He suggested a carpal tunnel release to relieve Claimant's hand numbness. He recommended physical therapy and opined Claimant could return to work subject to the "previous restrictions," i.e., a 20-pound limitation on lifting and no overhead cable pulling. (EX-34, p. 3).

Charles Frye, M.D.

On July 26, 2003, Claimant was examined by Dr. Frye whose credentials are absent from the record. Claimant presented with complaints of pain in his neck, occasionally radiating down to his arms and legs. He indicated difficulty with positions that require his neck to support his head. Dr. Frye noted Claimant can walk for thirty minutes, stand for thirty minutes, and sit for forty-five minutes. (EX-41, p. 1). Dr. Frye diagnosed a "neck injury and subsequent pain." He further opined Claimant suffered from anxiety. He also noted a finding of carpal tunnel syndrome, although he found "no real limitations on physical exam." Dr. Frye suggested the foregoing problems limit Claimant's ability to sit, stand, walk, and lift. (EX-41, p. 3).

John Stoudenmire, Ph.D.

Claimant was seen by Dr. Stoudenmire on December 17, 2003. He noted Claimant complained of carpal tunnel syndrome in both hands, pain and numbness in his left and right arms at times, and the inability to stand for extended periods of time. Claimant indicated that he is able to bathe, dress, and feed himself without difficulty. Claimant also does limited cleaning at home and can fix some meals. Dr. Stoudenmire noted Claimant interacts daily with family and friends, either personally or via telephone. Claimant watches television and reads the newspaper. (EX-42, pp. 1-2). Dr. Stoudenmire diagnosed Claimant with "adjustment disorder with anxiety and depression"

due to his limitations. (EX-42, p. 3).

The Vocational Evidence

Mr. Joe H. Walker, C.R.C.

Mr. Walker was authorized by the U.S. Department of Labor (DOL) to provide counseling and guidance to Claimant and to discuss Claimant's work restrictions with Employer. (EX-35, p. 1). Mr. Walker generated a vocational rehabilitation report on February 12, 1998, that covered the dates of January 12, 1998 to February 12, 1998. In the report, Mr. Walker noted Claimant was working in Employer's electrical department under the permanent restrictions set by Dr. Danielson on January 8, 1998. (EX-35, p. 5). On January 23, 1998, Mr. Walker found Claimant working in a modified capacity from shoulder level down with the opportunity to change his posture and take periodic breaks as needed. (EX-35, pp. 9-11). Mr. Walker followed-up on January 29, 1998. Claimant indicated he experienced "occasional symptomatic episodes" which affected his hands more than his neck or shoulders. However, Claimant felt he was working in a "satisfactory manner" and noted that he had "continued improvement and tolerance to activity." (EX-35, pp. 11-12). On February 10, 1998, Claimant continued to feel his work was satisfactory and had no problems with his assignments. (EX-35, p. 12).

On March 18, 1998, Mr. Walker wrote a vocational rehabilitation report covering February 13, 1998 to March 18, 1998. On February 24, 1998, Claimant offered no significant complaints about his work, but did have general complaints about increased symptoms. Claimant indicated he performs overhead work or activities until he "becomes tired or symptomatic." (EX-35, p. 2). On March 4, 1998, Mr. Walker opined Claimant was "attempting to perform a range of task activity up to the upper margins of his restrictions." Claimant felt his symptoms had progressed, but were not as great as they were prior to surgery. (EX-35, pp. 15-16). On March 6, 1998, Claimant informed Mr. Walker that he noticed a "difference" in his "symptoms" on days that he does not perform overhead or shoulder level activity, with or without a ladder. Claimant expressed a desire to continue his work activity at the "present status." (EX-35, p. 18). On March 17, 1998, Claimant indicated he had no problems with work activity below the shoulder or "on the bulkhead," but complained of leg numbness. (EX-35, p. 21).

Mr. Tommy Sanders, C.R.C.

Mr. Sanders was asked by Employer to perform a labor market survey based on the restrictions assigned to Claimant by Dr. Jackson. The restrictions were identified as no repetitive hand or wrist activities, no arm work above 90 degrees, no fixed or advanced neck activity, and no lifting greater than 30 pounds. (EX-37, p. 3)

On March 11, 2003, Mr. Sanders created a preliminary vocational assessment/labor market survey. The report indicated Claimant graduated high school and completed a two-year electricity training program with a certificate from Pearl River Community College. The report reflects that Claimant was employed by Employer since 1971 and completed an electrician apprentice program with Employer. (EX-37, pp. 5-8). In his vocational analysis, Mr. Sanders opined Claimant was qualified for "a range of primarily sedentary to light physically demanding occupations through selective job placement." He identified a position as a full-time fuel booth attendant with Coastal Energy which paid $6.15 per hour. He also identified a position as a convenience store cashier with Munro Petroleum that paid $6.00 per hour and an opening with Pinkerton's Security that paid from $5.50 to $6.00 per hour. The job descriptions identified either negligible lifting or lifting up to 10 pounds. However, the job descriptions did not address Claimant's limitation on "repetitive hand and wrist activity," nor his limitation on overhead work. (EX-37, pp. 3-4).

On July 15, 2004, using the same restrictions as in the previous survey, Mr. Sanders identified the following three employment opportunities: (1) a cab dispatcher with Yellow Cab/Pascagoula Cab Company that paid $5.15 per hour; (2) a security guard with Swetman Security that paid $7.00 per hour; and (3) a fuel booth cashier with Coastal Energy that paid $6.15 per hour. (EX-37, pp. 10-11). Although the survey suggested the three jobs "should not expose the employee to repetitive use of the left hand and wrist, above-shoulder level position or advanced neck positions," the positions with Yellow Cab and Coastal Energy both required frequent use of the upper extremities.[6] (EX-37, p. 11).

[6] The parties' stipulations did not address suitable alternative employment. The job descriptions do not address Claimant's specific limitations in sufficient detail to warrant a conclusion that the stipulation of permanent total disability is not supported by the record. I find that it is so supported.

The Contentions of the Parties

Employer filed two petitions for Section 8(f) relief. In one petition, Employer contends it is entitled to Section 8(f) relief for injuries sustained by Claimant on September 24, 1996. Employer argues Second Injury Fund relief is applicable based on pre-existing injuries sustained by Claimant in a 1987 motor vehicle accident and in a 1993 work-related injury.

Employer also filed a Petition for Second Injury Fund Relief pertaining to the injuries sustained by Claimant on November 27, 2001. Employer argues entitlement to Second Injury Fund relief due to Claimant's pre-existing and manifest injuries sustained in the September 1996 accident. Employer argues the pre-existing injuries combined with and contributed to the November 2001 injury resulting in greater disability than would have resulted from the second injury alone. Employer also contends that the Director untimely raised the absolute defense in brief. Finally, Employer asserts the proper burden in a permanent total disability claim is merely proof that the total disability is "not due solely" to the second injury, rather than proof that the current disability is "materially and substantially" greater due to the pre-existing injury.

The Director, through the Regional Solicitor, contends that both of Employer's Petitions for Second Injury Fund Relief should be dismissed based on the absolute defense because Employer untimely submitted the applications. The Director also argues that Employer is not entitled to Section 8(f) relief regarding the September 1996 injuries because no medical evidence supports a finding of a pre-existing permanent partial disability. With respect to the November 27, 2001 injury, the Director argues Employer failed to show how Claimant's pre-existing injuries combined with the second injury to result in a materially and substantially greater disability than that which Claimant would have sustained from the November 2001 injury alone.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative

Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

Prefatorily, it is noted the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

Based on the parties' stipulations, agreed to by Regional Solicitor, there must first be an award of compensation and medical benefits before treating the Section 8(f) issue. See Gupton v. Newport News Shipbuilding & Dry Dock Company, 33 BRBS 94 (1999).

Based on the stipulations of the parties and the record evidence, I find and conclude that Claimant is entitled to temporary total disability from October 5, 1996 to October 20, 1996; from October 26, 1996 to October 20, 1997; from January 9, 1998 to January 11, 1998; and from May 14, 1999 to September 20, 1999 as a result of his September 24, 1996 work injury based on his average weekly wage of $589.60. I further find and conclude

that Claimant was temporarily totally disabled from March 8, 2002 to August 29, 2002 and permanently totally disabled from August 30, 2002 to present and continuing as a result of his November 27, 2001 work injury based on an average weekly wage of $659.20. Employer is and remains responsible for Claimant's past and future medical care and expenses causally related to his compensable work injuries of September 24, 1996 and November 27, 2001.

A. Timeliness of Employer's Claim for Section 8(f) Relief – The Absolute Bar

The 1984 Amendments to Section 8(f)(3) require that the Section 8(f) issue be presented to the district director prior to the consideration of the claim by the district director, and that "[f]ailure to present such request prior to such consideration shall be an absolute defense to the special fund's liability . . . unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order." 33 U.S.C. §908(f)(3).

Under 20 C.F.R. §702.321(b), an employer must request Section 8(f) relief "as soon as the permanency of the claimant's condition becomes known or is an issue in dispute." In explanation, the regulations specifically refer to the time when permanent disability benefits are first paid or at an informal conference where permanency is discussed. The regulations detail the requirements for a "fully documented application" for Section 8(f) relief, and set forth the time for filing the application for relief. 20 C.F.R. §702.321(a) (1) and (b)(1).

When all parties are on notice that permanency is an issue through the LS-141, Notice of Informal Conference, the "fully documented application must be submitted at or before the conference." 20 C.F.R. §702.321(b)(1)(i). Otherwise, when permanency is first raised at the informal conference, the district director shall set a date for submittal of the fully documented application and notify the employer/carrier. 20 C.F.R. §702.321(b)(1)(ii). An application for Section 8(f) relief need not be submitted to the district director when claimant's condition has not reached maximum medical improvement and no claim for permanency is raised by the date of referral to the OALJ. 20 C.F.R. §703.321(b)(3).

Under 20 C.F.R. §702.321(b)(3), liability of the special fund may be shielded by an absolute defense when an employer fails to submit a fully documented application by the date

established by the district director. "This defense is an affirmative defense which must be raised and pleaded by the Director." 20 C.F.R. 702.321(b)(3); see also, Abbey v. Navy Exchange, 30 BRBS 139 (1996). Consequently, it follows that "the district director may not raise the absolute defense for the Director by virtue of a referral letter stating the defense." Abbey, 30 BRBS at 142 (contrasting the District Director's referral form letter with other cases in which the Director asserted the Section 8(f)(3) bar by filing a Motion to Dismiss employer's requested relief).

On July 15, 2003, Employer filed a Petition for Second Injury Fund Relief in the two claims at issue: OWCP file number 07-163007, docketed as Case No. 2003-LHC-2174, and OWCP file number 07-141493, docketed as Case No. 2003-LHC-2173, which relate to the accidents occurring on November 27, 2001 and September 27, 1996, respectively. The timeliness of Employer's petition for each claim and the applicability of the absolute defense will be addressed separately, beginning with the claim for the November 27, 2001 injury.

On December 2, 2002, Employer filed a Notice of Controversion that listed "8(f)" as a reason for controverting Claimant's right to compensation. (EX-22, p. 3). On April 14, 2003 and May 21, 2003, Employer filed two additional notices of controversion that identified "8(f)" as a reason for controverting Claimant's right to compensation. (EX-22, pp. 4, 6). Claimant's LS-203 Claim for Compensation, dated April 4, 2003, affirmatively indicates that the "injury resulted in permanent disability, amputation, or serious disfigurement," which Claimant specified as permanent total disability or permanent partial disability, in the alternative. (EX-20, p. 4).

In addition, two informal telephone conferences were held regarding the November 27, 2001 injury. On January 13, 2003, a Notice of Informal Telephone Conference was distributed that listed "[p]ermanency" as the sole issue for the conference. (DX-B). The Memorandum of Informal Conference, which was held on January 23, 2003, does not reflect a request or the filing of an application for Section 8(f) relief. (DX-C). On May 19, 2003, a Notice of Informal Telephone Conference for June 6, 2003, listed the relevant issues as "[m]edical, average weekly wage, [e]xtent of disability." (DX-D). According to the Memorandum of Informal Conference of June 6, 2003, Employer requested Section 8(f) relief, but did not file an application for such relief. The Director indicated the absolute defense

would be asserted. (DX-E).

As early as December 2, 2002, Employer's notices of controversion indicate it was aware that Section 8(f) was an issue in the November 2001 claim. Further, Claimant's LS-203 Claim for Compensation form dated April 4, 2002, put Employer on notice that permanency was at issue. Most importantly, the Notice of Informal Conference dated January 13, 2003, specifically listed "permanency" as an issue to be decided at the informal conference. By regulation, Employer was therefore required to submit a fully documented application "at or before the conference." Nonetheless, Employer waited until the second informal conference on June 6, 2003 to request Section 8(f) relief and did not file its application for relief until July 15, 2003. Failure to present a Section 8(f) request at the informal conference (either on January 13, 2003 or June 6, 2003) shall be an absolute defense to the Special Fund's liability. Employer has not argued it could not have reasonably anticipated the liability of the Special Fund prior to the issuance of an order, which is the only regulatory caveat to the application of the absolute defense. Clearly, a claim for permanent disability was raised and Claimant had reached maximum medical improvement prior to the District Director's referral of the claim to OALJ, mandating the filing of a request for Section 8(f) relief. See 20 C.F.R. §702.321(b)(3). Moreover, Employer failed to request an extension within which to file such a request as prescribed by 20 C.F.R. §702.321(b)(2). Consequently, I conclude Employer did not timely request second injury fund relief for the November 27, 2001 injury and the absolute defense which was properly and timely asserted by the Director is applicable as a bar to such relief.

As to the September 24, 1996 injury, Employer listed "8(f)" as one reason for controversion on four LS-207 Notices of Controversion dated October 16, 1996, November 27, 1996, May 17, 1999, and December 20, 2000. (EX-10, pp. 2-5). However, unlike the claim for the November 2001 injury, permanency is not identified on the Claimant's Claim for Compensation, nor is it listed as an issue on the Notice of Informal Telephone Conference for the September 1996 injury.[7] Rather, the notice lists "extent of disability" which arguably concerns totality of disability, rather than the nature, or permanency, of

[7] The Notice of Informal Telephone Conference regarding the September 1996 injury is the same Notice of Informal Conference issued on May 19, 2003, regarding the November 27, 2001 injury. It should be noted that the notice refers to an injury date of September 27, 1996, rather than September 24, 1996.

disability. (DX-D); See Davis v. Delaware River Stevedores, 38 BRBS 119 (ALJ) (2004) (Employer was on notice that "the nature (permanent or temporary)" of disability was in issue because District Director's notice listed "nature and extent" as issues). Employer requested Section 8(f) relief at the informal conference, and the Director indicated it would present the absolute defense. (DX-E).

Because the Notice of Informal Telephone Conference failed to list permanency as an issue, I find Employer was not required to file its application for Section 8(f) relief at the time of the conference. Further, I find that Employer's notices of controversion are not enough to establish that permanency of the condition was known or was an issue in dispute. Consequently, I find the issue of permanency in the September 1996 claim was raised for the first time at the informal conference held on June 5, 2003. The record does not reflect that the District Director set a deadline for the submittal of a fully documented application in the claim; thus, I conclude Employer's Petition for Second Injury Fund Relief for the September 24, 1996 injury was timely filed.

With respect to the September 24, 1996 injury and its accompanying Section 8(f) relief request, permanency was not raised in the claim for compensation and was not identified as an issue at the June 6, 2003 conference. Without notice of a permanency issue prior to the informal conference, Employer was not required to submit its fully documented application at the time of the informal conference. Further, the record does not indicate the District Director set forth a time for submitting the application. Consequently, Employer did not file a fully documented application for Section 8(f) relief as a result of the September 1996 injury until July 15, 2003. Based on the foregoing, I find that the absolute defense is inapplicable.

Based on the foregoing, I conclude that Employer's request for Section 8(f) relief in the November 27, 2001 matter, is untimely and liability of the special fund is precluded by the absolute defense. I further conclude that Employer timely requested Section 8(f) relief regarding Claimant's injuries sustained on September 24, 1996 and that the absolute defense is inapplicable to the claim.

B. Section 8(f) Application

Section 8(f) of the Act provides in pertinent part:

> (f) Injury increasing disability: (1) In any case which an employee having an existing permanent partial disability suffers [an] injury . . . of total and permanent disability or of death, found not to be due solely to that injury, of an employee having an existing permanent partial disability, the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.
>
> (2)(A) After cessation of the payments . . . the employee . . . shall be paid the remainder of the compensation that would be due out of the special fund established in section 44 . . . 33 U.S.C. § 908(f).

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability, (2) the pre-existing disability was manifest to the employer, and (3) that the current disability is not due solely to the employment injury. 33 U.S.C. § 908(f) Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750, 23 BRBS 34 (CRT) (5th Cir. 1990); 33 U.S.C. § 908(f); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C&P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984). Employment related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such case. Strachan Shipping Company v. Nash, supra, at 516-517 (5th Cir. 1986) (en banc).

Section 8(f) is to be liberally applied in favor of the employer. Maryland Shipbuilding and Drydock Co. V. Director, OWCP, U.S. DOL, 618 F.2d 1082 (4th Cir. 1980); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980), aff'g Ashley v. Todd Shipyards Corp., 10 BRBS 423 (1978). The reason for this liberal application of Section 8(f) is to encourage employers to hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. Id. "Disability" as defined in Section 8(f) is not confined to conditions which cause purely economic loss. C&P Telephone Company, supra. "Disability" includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Campbell Industries Inc., supra; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1197-1199 (5th Cir. 1977).

1. The September 24, 1996 injury (OWCP No. 07-141493)[8]

I find that the record medical evidence does not establish that Claimant suffered a pre-existing permanent partial disability to his neck and right shoulder. Employer's petition relies on injuries sustained in a 1987 motor vehicle accident and a 1993 work-related injury. However, the record offers limited medical evidence which pre-dates the September 1996 injury. The record contains one patient registration form dated May 12, 1990, which indicates Claimant was injured in a motor vehicle accident. There is no indication that the accident resulted in a permanent disability or limited work restrictions. Further, the only suggestions of a 1987 motor vehicle accident are contained in the reports of Dr. Smith, Dr. Danielson, and Dr. Mostellar, all of whom were treating Claimant for his September 1996 injuries. Each physician noted a 1987 accident in Claimant's medical history. According to Drs. Smith and Danielson, Claimant claimed to have completely recovered from the accident. Their records do not reflect any permanent disability or restrictions resulting from the motor vehicle accident.

As to the pre-existing disability of 1993, one entry

[8] Although Employer did not brief Second Injury Fund Relief with respect to the September 1996 injury, Employer filed a Petition for Second Injury Fund Relief for the injury and the Director addressed such relief in its brief.

appears to be a doctor's report regarding a 1993 injury and describes complaints of pain in Claimant's right "trap area." However, the report contains no opinion as to the permanency of the condition, whether it resulted in work restrictions, or any impairment rating.

Based on the foregoing, I find and conclude Claimant did not suffer a permanent pre-existing disability at the time of the September 24, 1996 accident. Consequently, the remaining two requirements for Second Injury Fund Relief will not be addressed as there is no pre-existing disability to be manifest to Employer or to combine with the subsequent work injury of September 24, 1996. Accordingly, I find and conclude that Employer has not established entitlement to Section 8(f) relief for the September 24, 1996 work injury.

2. The November 27, 2001 injury (OWCP No. 07-163007)

As noted above, the absolute defense was asserted for Employer's failure to file a fully documented Section 8(f) application at or prior to the informal conference and prior to the referral of the November 27, 2001 injury claim to OALJ. Notwithstanding Employer's knowledge that Claimant was permanently disabled and was seeking permanent disability compensation as early as January 13, 2003, Employer failed to file an application for Section 8(f) relief at or prior to the informal conferences of January 23, 2003 and June 6, 2003. Employer failed to request an extension of time to file its application. Therefore, as found above, Employer's application for Section 8(f) relief for the November 2001 injury is barred by the absolute defense and the merits of the application will not be further considered.

V. COST OF LIVING INCREASES

Section 10(f), as amended in 1972, provides that in all post-Amendment injuries where the injury resulted in permanent total disability or death, the compensation shall be adjusted annually to reflect the rise in the national average weekly wage. 33 U.S.C. §910(f). The parties stipulated to Claimant's entitlement to permanent total disability benefits. However, the parties did not address the applicability of Section 10(f) in the stipulations. Accordingly, upon reaching a state of permanent and total disability on August 30, 2002, Claimant is entitled to annual cost of living increases, which rate is adjusted commencing October 1 of every year, and shall commence October 1, 2002. This increase shall be the lesser of the

percentage that the national average weekly wage has increased from the preceding year or five percent, and shall be computed by the District Director.

VI. ORDER

Based upon the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer's requests for Section 8(f) relief for Claimant's September 24, 1996 and November 27, 2001 claims are hereby **DENIED**.

2. Claimant's claims at all times pertinent hereto are subject to the jurisdiction of the Longshore and Harbor Workers' Compensation Act.

3. For Claimant's work-related injury on September 24, 1996, Employer shall pay Claimant compensation for temporary total disability from October 5, 1996 to October 20, 1996; from October 26, 1996 to October 20, 1997; from January 9, 1998 to January 11, 1998; and from May 14, 1999 to September 20, 1999, based on Claimant's average weekly wage of $589.90, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

4. For Claimant's work-related injury on November 27, 2001, Employer shall pay Claimant compensation for temporary total disability from March 8, 2002 to August 29, 2002 based on Claimant's average weekly wage of $659.20, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

5. Employer shall pay Claimant compensation for permanent total disability from August 30, 2002 to present and continuing thereafter based on Claimant's average weekly wage of $659.20, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

6. Employer shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2002, for the applicable period of permanent total disability.

7. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's September 24, 1996 and November 27, 2001 work injuries, pursuant to the provisions of Section 7 of the Act.

8. Employer shall receive credit for all compensation heretofore paid, as and when paid.

9. Employer shall pay to Claimant's attorney, Sue Dulin, a reasonable and necessary attorney's fee for successfully prosecuting this claim pursuant to Section 28 of the Act in the amount of $25,000.00. Employer shall also be responsible for the attorney's fee and/or lien of Claimant's previous attorney, if any.

ORDERED this 18th day of November, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge